Supreme Court, U.S.
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90-1971

No. 90-

IN THE

Supreme Court of the United States

October Term, 1990

FEDERAL INSURANCE COMPANY,
Petitioner,

v.

SUSQUEHANNA BROADCASTING COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the affirmance by the Court of Appeals for the Third Circuit of the District Court's finding that costs incurred by an insured in responding to an administrative directive to study or remediate a contaminated site are covered by policies of comprehensive general and excess liability insurance defeats the purpose of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to assure that those responsible for environmental harm bear the costs of their actions.

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REPORTS OF OPINIONS BELOW

The initial Judgment and Opinion of the United States District Court for the Middle District of Pennsylvania is reported at 727 F. Supp. 169, 20 Envtl. L. Rep. 20,622 (M.D. Pa. 1989). That Judgment was modified on reconsideration. The District Court's opinion on reconsideration is reported at 738 F. Supp. 896, 20 Envtl. L. Rep. 21,295 (M.D. Pa. 1990). The Judgment Order of the United States Court of Appeals for the Third Circuit is reported at 928 F.2d 1131 (3d Cir. 1991). The Court of Appeals' denial of rehearing is presently unreported, but is attached hereto at A-25.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Third Circuit on February 22, 1991. Rehearing was subsequently denied by Order dated March 28, 1991.

STATUTES AND REGULATIONS INVOLVED

This case involves the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA").The text of the pertinent provisions of this statute is set forth at pages A-27 through A-40 of the Appendix.

STATEMENT OF THE CASE

1. Case History

This matter originated as a declaratory judgment action[1] instituted by petitioner, Federal Insurance Company ("Federal")[2] in February, 1988.[3] The action sought a declaration that Federal had no duty to defend or indemnify Susquehanna Broadcasting Company ("SBC") for the cost of cleaning up environmental pollution at two sites in central Pennsylvania. Up to the time that it instituted this action, Federal had defended SBC under full reservation of rights in connection with claims brought by area residents, and claims for contribution brought by Westinghouse Electric Corporation arising out of the same alleged site contamination. Federal had also paid, in full, SBC's share of settlement of the residents' suit.

The parties cross-moved for summary judgment. On December 21, 1989, Judge William W. Caldwell of the Middle District of Pennsylvania issued a Memorandum and Order declaring that Federal had a duty to indemnify and defend SBC on the third-party claim of Westinghouse Electric for response costs arising from the underlying action styled as *Fishel v. Westinghouse*, Civil Action No. 85-0216 (M.D. Pa.). The December 21, 1989, Memorandum and Order is attached hereto at A-3. Applying Pennsylvania law, Judge Caldwell determined that, notwithstanding the fact that the term "damages" in Federal's policies of insurance had a precise, "technical" and unambiguous meaning, it nevertheless included the costs of responding to the various governmental directives which formed the basis for Westinghouse's liability for which it was seeking contribution from SBC in the underlying actions. The Order also declared, however, that the amount properly recoverable by SBC was limited, under principles of Pennsylvania property law, to the value of the contaminated sites.

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1. All parties named in the original action appear in the caption of this petition.

2. Federal is a wholly-owned subsidiary of its parent, The Chubb Corporation. Federal itself has no ownership interest in any subsidiary corporations other than those which it wholly owns.

3. Jurisdiction was based on diversity of citizenship of the parties, the amount in controversy exceeding $50,000 exclusive of interest and costs as provided by 28 U.S.C. § 1332.

The December 21 Order followed the cases of *Techalloy Co., Inc. v. Reliance Insurance Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984), and *Lower Paxon Township v. United States Fidelity & Guaranty Co.*, 383 Pa. Super. 558, 557 A.2d 393 (1989), in stating that, for the years of Federal's policies in which the pollution exclusion clause was included, the plain and unambiguous language of that clause would bar SBC's recovery for gradual pollution.[4] Judge Caldwell held that the pollution giving rise to the EPA action and Westinghouse's subsequent contribution claim against SBC had been established as gradual pollution during the trial of the underlying action.

The court also determined, however, that, pursuant to *ACandS, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968 (3d Cir. 1985), a case which involved insurance coverage for asbestos-related injuries, Pennsylvania law would permit full recovery for gradual pollution of property, under the exposure theory, from those years of Federal's coverage when the policies did not contain the pollution exclusion clause.

SBC moved for reconsideration of the Court's Order under Rule 59(e) of the Federal Rules of Civil Procedure. By its motion, SBC sought to have the Court delete its discussion concerning the pollution exclusion clause, reverse its holding that "damages" should be viewed in the technical sense as dictated by Pennsylvania case law, and eliminate the property value limitation on the recoverability of those damages. On May 18, 1990, the Court below issued an Order removing the property value limitation cap on recoverable damages and denying all other aspects of SBC's Motion. The District Court's Opinion on reconsideration is attached hereto at A-20.

Both parties appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. The issues presented by Federal on appeal to the Third Circuit included: whether the term "as damages" as used in Federal's policies of insurance issued to SBC contemplated coverage for response costs

4. In light of its determination concerning the trigger of coverage, the District Court found it unnecessary to resolve the dispute between the parties concerning whether the pollution exclusion clause was first set forth in Federal's policy which went into effect on March 2, 1976, or the policy covering the year beginning March 2, 1977. Federal has insured SBC since March 2, 1968, under various policies of insurance.

incurred pursuant to CERCLA; if so, when coverage for such costs is triggered; whether coverage for such costs is limited to the value of the property; and whether the Release executed by the parties in the underlying action, *Fishel v. Westinghouse*, 640 F. Supp. 442 (M.D. Pa. 1986), extinguished any claims by Westinghouse for contribution or indemnification.

On February 22, 1991, the Court of Appeals affirmed the District Court's judgment without opinion. The Court of Appeals' affirmance and order is attached hereto at A-1. Federal subsequently filed a Petition for Rehearing together with a suggestion for rehearing *en banc*. On March 28, 1991, Federal's Petition for Rehearing was denied. The Court of Appeals' denial of Federal's Petition for Rehearing is attached hereto at A-25.

2. Factual Background

The underlying case presented a dispute between Federal and one of its insureds, SBC, over the meaning and effect of plain and unambiguous language contained in several of Federal's policies of insurance. SBC's Pfaltzgraff division, a manufacturer of pottery and stoneware, allegedly generated and disposed of wastes containing heavy metals and other contaminants over the course of years of operation. In 1983 and 1984, investigations carried out by the Pennsylvania Department of Environmental Resources ("DER") and the Federal Environmental Protection Agency ("EPA") determined that these wastes posed a threat to the environment.

Federal's insuring agreements during all of the relevant time included the following language:

> The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages by reason of liability to which the insurance applied... for bodily injury, property damage or personal injury caused by an occurrence ....

For a substantial portion of the time in question, Federal's policies also included language which, under Pennsylvania law, clearly and unambiguously forecloses insurance coverage for:

> Bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes,

> acid, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

SBC's involvement in the underlying actions arose from its alleged use of the services of Frederick Shealer over the course of a number of years to dispose of the liquid industrial waste generated by Pfaltzgraff. According to the allegations of the underlying actions, SBC's wastes ended up at the Hunterstown Road and Shriver's Corner sites which had also been repositories for wastes from several other companies. These locations were the subject of DER and EPA investigation and inquiry in 1983 and 1984. SBC's wastes are alleged to have contributed to the contamination found to be present at the sites.

If SBC did use Mr. Shealer's services, all testimony and allegations in both of the underlying actions demonstrated that SBC's use of Mr. Shealer was routine, in the ordinary course of business, and occurred over a period of time. There was neither testimony nor allegation to contradict the conclusion that any pollution at the sites occurred as the result of a gradual build up of SBC's wastes, together with those of the other defendants, including Westinghouse, and the gradual release of contaminants into the environment, including the groundwater, over the course of time. Accordingly, the Courts below correctly found that the pollution occurred gradually over a period of years, a fact which had been established at the trial of the underlying action. *Fishel v. Westinghouse Electric Co.*, 640 F. Supp. at 442 (M.D. Pa. 1986).

Up until March 22, 1988, when it withdrew its coverage from SBC, Federal defended SBC in connection with all aspects of the underlying actions, subject to a complete reservation of rights. In connection with this defense, Federal paid $69,032.31 in legal fees and expenses which, up until March 22, 1988, constituted SBC's complete costs of defense in the underlying actions. In settlement of plaintiffs' claims, Federal paid on SBC's behalf $78,000.[5]

At the time of the cross-motions for summary judgment, the only active claims against SBC which formed the basis for any

5. At the time that SBC settled with Plaintiffs, the other generator defendants also settled their claims. Westinghouse had previously settled with plaintiffs.

remaining liability in the underlying actions were those contained in the Cross-Claim by Westinghouse against SBC and the other generator defendants in the *Fishel* action.[6] This case, therefore, squarely raised the question of whether, under Pennsylvania law, a contribution action for response costs constitutes a claim for compensable damages under Federal's contracts of insurance.

In light of the clear Pennsylvania Appellate Court authority, recognized by the District Court below, holding that the pollution exclusion clause unambiguously forecloses coverage for gradual pollution, and the District Court's finding that the pollution for which SBC was responsible was, indeed, gradual, this case also presented the question, under Pennsylvania law, of the applicable trigger of coverage for Federal's policies.

This petition presents an issue of national significance. The decisions of the courts below frustrate Congressional policy embodied in an important Federal statute. By affirming the District Court's decision that CERCLA response costs are covered by the policies of insurance at issue, the Third Circuit has, in effect, obliterated one of the principal purposes of CERCLA; that those responsible for environmental harm bear the costs of their actions. This result derives from the lower courts' manipulation of the policy language, specifically the term "as damages", the pollution exclusion clause, and the triggering occurrence, in order to create coverage for a risk which Congress clearly intended be borne by polluters.

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6. Plaintiffs' claims against the Shealers were also outstanding at the time of the cross-motions, as were cross-claims between the parties in the underlying and *Fishel* action. The cross-claims, however, were *pro forma* assertions of liability under theories of contribution and/or indemnification and are governed by the operation of the same legal principles which control disposition of Westinghouse's Third-Party Complaint. The cross-claims between generator defendents in *Fishel* were dismissed, by consent, on October 4, 1989.

ARGUMENT

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FINDING THAT ENVIRONMENTAL RESPONSE COSTS ARE COVERED BY THE INSURANCE POLICIES AT ISSUE DEFEATS THE PURPOSE OF CERCLA TO ASSURE THAT THOSE RESPONSIBLE FOR ENVIRONMENTAL HARM BEAR THE COSTS OF THEIR ACTIONS

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was enacted by Congress and signed into law in late December of 1980. The bill ultimately proposed to Congress was the result of a compromise between H.R. 7020 and S. 1480, drafted principally by Senators Jennings Randolph of West Virginia and Robert T. Stafford of Vermont. Due to the haste in which this compromise proposal was passed, floor debate was limited and no conference report was prepared. Congress' purposes underlying the compromise legislation, however, especially concerning liability for releases, can be drawn from the Senate Committee on Environment and Public Works report which accompanied S. 1480 from which CERCLA's liability provisions were taken.

This report makes clear in language as explicit as any of CERCLA's legislative history that one of the foremost purposes of this legislation was to "assure that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." Senate Committee on Environment and Public Works, Report on S. 1480, S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980) [hereinafter Report].

> The goal of assuring that those who caused chemical harm bear the costs of that harm is addressed in the reported legislation by the imposition of liability. Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the cost of doing business. . . . An important aspect of strict liability is that it would create a compelling incentive for those in control of

> hazardous substances to prevent releases and thus protect the public from harm.

Id. at 13-14.

> The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

Id. at 34.

Congress intended that this legislation reduce the risk to society created by the generation, handling, and disposal of hazardous substances, by assuring that those actors who had reaped the benefits of producing or trading in these substances in the past bear the financial burden of remediating injury and mitigating risk today.

While this allocation scheme does not in and of itself preclude insurance coverage, it clearly contemplates that in procuring such coverage the polluter would necessarily internalize the clean-up costs through the payment of premiums. In the ordinary course the amount of the premium would reflect the extent of the risk covered. In the present case, however, the courts below have found that insurance policies issued to SBC long before CERCLA was enacted provide coverage. By definition those policies could not have reflected the extent of the risk through the premiums charged. The courts below thus have held, in effect that SBC would not have to bear the costs of its past actions either directly, in the form of accountability for the costs of clean-up or indirectly, in the form of increased premium payments. Such a result is clearly inconsistent with Congress' purposes in enacting CERCLA.

The decisions below, however, go further than simply frustrating Congress' intent in enacting CERCLA. By permitting SBC to

recover all of its CERCLA obligations regardless of when the harm occurred, the courts below have completely ignored Congress' principal goal. Specifically, after correctly concluding that the pollution exclusion contained in Federal's policies would preclude coverage for CERCLA response costs, the courts nevertheless found that SBC would be entirely covered by virtue of the policies issued before the pollution exclusion was included.[7] Because these earlier policies were issued well in advance of CERCLA's enactment the premiums charged could not have reflected that risk. SBC, however, generated and disposed of hazardous waste between 1975 and 1983. In holding that all CERCLA liability would be covered by virtue of the early policies the lower courts have allowed SBC to escape any responsibility for the environmental harm caused by its waste products. Under this rule a responsible party such as SBC bears neither the direct costs of clean-up nor the indirect costs, through the medium of higher premiums, for the environmental harm which it has created.

7. Federal had insured SBC since March 2, 1968. The pollution exclusion was included in SBC's policies beginning either March 2, 1976 or 1977.

CONCLUSION

The holdings below, allowing SBC to escape liability for its CERCLA responsibilities based on insurance coverage which was secured during a time when CERCLA's strict liability scheme was unanticipated, defeats Congress' purpose of assuring that those responsible for environmental harm bear the costs of their actions. For the foregoing reasons, Federal Insurance Company, respectfully requests that this Court grant its Petition for Certiorari and set the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5523 and 90-5524

FEDERAL INSURANCE CO.

v.

SUSQUEHANNA BROADCASTING CO.

Federal Insurance Company,
Appellant in 90-5523

Susquehanna Broadcasting Co. ("SBC")
Appellant in 90-5524

Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil Action No. 88-00469
(Honorable William W. Caldwell)

Argued February 7, 1991

Before: MANSMANN, SCIRICA and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant/cross-appellee and appellee/cross-appellant, it is ADJUDGED AND ORDERED that judgment of the district court be and is hereby AFFIRMED.

Each party to bear its own costs.

BY THE COURT:

/s/
Circuit Judge

Attest:

/s/
Sally Mrvos, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL
INSURANCE COMPANY, :
Plaintiff
:
vs. : CIVIL ACTION NO. 88-0469
:
SUSQUEHANNA
BROADCASTING COMPANY,
Defendant :

MEMORANDUM

I. Introduction.

The parties have cross-moved for summary judgment pursuant to Fed. R. Civ. P. 56. This declaratory judgment action was brought by plaintiff, Federal Insurance Company ("Federal"), to establish that it has no duty to indemnify defendant, Susquehanna Broadcasting Co. ("SBC), for the costs of cleaning up environmental pollution under comprehensive general liability insurance policies in effect between the parties. Plaintiff also asserted a claim for restitution of defense costs for allegedly non-covered claims. The main issues presented are those commonly occurring in litigation of this type: (1) whether response costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 6901 *et seq.*, constitute "damages" within the meaning of the policies; and (2) whether a policy exclusion providing coverage only for "sudden and accident" releases of pollutants bars indemnification.. An additional issue is plaintiff's contention that under Pennsylvania law the settlement of litigation between SBC and plaintiffs in the underlying action extinguished the right of another defendant to seek contribution

from SBC for response costs that defendant was required to expend under governmental order. The principal issues have been extensively litigated in the past, sometimes with sharp conflicts between courts. We will examine the motions under the well established standard. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This is a diversity action controlled by Pennsylvania law.

II. Background.

Frederick Shealer operated a waste hauling and disposal business in the Gettysburg, Pennsylvania area. He would pick up and dispose of wastes for various waste generators, including Westinghouse Electric Corporation and SBC. Eventually, over a period of years, certain of these wastes contaminated soil and well water in adjoining residential areas. Those neighbors affected brought suit. *See Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531 (M.D. Pa. 1985) and 640 F. Supp. 442 (M.D. Pa. 1986) for some background.[1] Westinghouse was also ordered by the Environmental Protection Agency ("EPA") to clean up the contaminated areas pursuant to 42 U.S.C. § 9607(a). Westinghouse arranged a settlement with the plaintiffs and also joined SBC, and other third party waste generators, as third party defendants. Westinghouse sought contribution and indemnity for its liability to the plaintiffs and for response costs it incurred in complying with the EPA order. Upon their motion, the plaintiffs eventually were also permitted to bring direct claims against the third party defendants.

SBC tendered defense of the claims to Federal in January of 1986. The insurance company at first declined to provide a defense, contending in letters to SBC's Chief Counsel, dated May 30, 1986 and June 3, 1986, that there was no coverage under primary and excess policies in force between the parties. Eventually, by letter dated February 19, 1987, Federal did agree to provide a defense but did so under a reservation of rights. Despite plaintiff's contrary contention, Federal did not assert at that time, or at any time previously, that it was denying coverage because CERCLA response costs were not damages within the meaning of

1. A similar case was filed at *Arentz v. Westinghouse Electric Corp.*, No. 86-1674 (M.D. Pa.) but was consolidated with the *Fishel* action.

the policy language. The first time Federal raised that issue was in a letter, dated September 22, 1987, from an environmental claims supervisor to defendant's Chief Counsel.

In early 1988, plaintiff settled the neighbors' claims against defendant. On March 25, 1988, plaintiff notified defendant that Federal no longer considered itself obligated to act further on SBC's part since the remaining claims were those of Westinghouse against SBC, which sought contribution for costs plaintiff considered beyond the coverage it provided. Plaintiff paid the complete costs of defending the action up to the time of its withdrawal. Since that time, Westinghouse and the third party waste generator defendants agreed in the *Fishel* action to dismiss the claims against each other. See *Fishel, supra,* order, dated October 4, 1989.

III. Discussion.

Plaintiff's course of conduct in discharging its obligations to accept or deny coverage and, in turn, defend the action, forms the basis of a preliminary argument by defendant that Federal has waived its argument on the damages coverage issue or, alternatively, should be estopped from arguing it. SBC argues that plaintiff's failure to set forth its "'damages' defense" in its reservation of rights letter precludes its presentation in the instant action. (doc. no. 26, defendant's opposition and supporting brief at p. 15). Defendant claims that this position is particularly appropriate "where, as here, the insured is prejudiced because the insurer later seeks recoupment of defense costs or the insured has foregone the opportunity to obtain an early ruling as to that coverage issue." (*Id.* p. 16). Further prejudice is claimed in defendant's reply brief, (doc. no. 36 at p. 5), in that SBC "had accepted Federal's defense and effectively ceded control of the litigation to Federal and its designated counsel."

We can make short work of the waiver argument. Defendant is simply wrong as a matter of Pennsylvania law in asserting that when an insurer "does not raise an objection to coverage, and defends with a reservation of rights, the failure to raise the issue results in waiver ... as to that objection." (doc. no. 26 at p. 15-16). This position has been rejected by Pennsylvania courts and federal district courts interpreting Pennsylvania law. Rather, Pennsylva-

nia uses an estoppel approach. *See Pfeiffer v. Grocers Mutual Insurance Co.*, 251 Pa. Super. 1, 379 A.2d 118 (1977). As stated in *Weintraub v. St. Paul Fire and Marine Insurance Co.*, 609 F. Supp. 273, 275 (E.D. pa. 1985) (cited cases omitted), under Pennsylvania law, "an insurer's failure to assert all possible defenses when denying coverage will create an estoppel only when such failure causes the insured to act to his detriment in reliance thereon." *See also Bensalem Township v. Western World Insurance Co.*, 609 F. Supp. 1343 (E.D. Pa. 1985).

We have no particular quarrel with the cases cited by defendant in support of its waiver argument. See *Intel Corporation v. Hartford Accident and Indemnity Co.*, 692 F. Supp. 1171 (N.D. Cal. 1988) and *Central Armature Works v. American Motorists Insurance Co.*, 520 F. Supp. 283 (D. D.C. 1980). They are simply inapposite here because they do not involve Pennsylvania law.[2] Other cases cited by defendant are distinguishable. *Beckwith Machinery Co. v. Travelers Indemnity Co.*, 638 F. Supp. 1179 (W.D. Pa. 1986); *Safeco Insurance Co. v. Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986) and *Ebert v. Balter*, 83 N.J. Super. 545, 200 A.2d 532 (1964), all involved cases where the insurer accepted coverage, defended the underlying action for some period of time without a reservation of rights, and then abruptly withdrew from the case. Imposition of liability on the company in those circumstances was in accord with the general Pennsylvania rule "that an insurance company may not undertake the defense of a suit which entails the defendant's relinquishing to the company the management of the case and then turn around and deny liability under its policy." *Brugnoli v. United Nat'l Insurance Co.*, 284 Pa. Super. 511, 516, 426 A.2d 164, 166-67 (1981) (quoted case omitted). Here, as noted, there is a reservation of rights letter which compels a different conclusion. *See Draft Systems, Inc. v. Alspach*, 756 F.2d 293 (3d Cir. 1985).

We must therefore determine if plaintiff should be estopped from arguing that its policies are inapplicable to defendant's claims because defendant is not seeking "damages" within the

2. Defendant's failure to refer to the relevant Pennsylvania case law in its briefs is curious. In particular, we have in mind the *Weintraub* decision since *Weintraub* was footnoted in *Intel* as a case invoking the estoppel approach. *See Intel*, 692 F. Supp. at 1171, 1181 n.11.

meaning of the policies. To apply estoppel here SBC must show that it has been prejudiced by plaintiff's failure to assert this ground in its reservation of rights letter and earlier denials of coverage. *See Pfeiffer, supra.* As noted, defendant claims prejudice because: (1) Federal has sought recoupment of defense costs; (2) defendant has foregone an opportunity to obtain an early ruling on this coverage issue; and (3) SBC accepted Federal's defense of the underlying action and ceded control of that litigation to Federal and its designated defense counsel.

In light of the reservation of rights letter, none of these contentions, without more, establishes the necessary prejudice. Defendant knew that plaintiff was disclaiming coverage on other grounds so a claim for recoupment of counsel fees should not have been surprising.[3] Defendant has also foregone an early ruling on all coverage issues so its inaction in regard to this particular issue could not have been prejudicial. Finally, the ceding control of the litigation to Federal and its counsel is not sufficient. Defendant had knowledge of the initial refusal to defend and the plaintiff's issuance of the reservation of rights letter. Defendant nevertheless accepted plaintiff's choice of counsel. We will therefore address plaintiff's argument on the merits.

There were various policies in effect during the relevant time period.[4] A representative policy contained the following language:

> The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages by

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3. We note that the claim for counsel fees is for fees expended in defense of non-covered claims so the merits of this claim are not connected to the early failure to assert the damages defense. The two issues are simply not relevant to each other. What is important is that plaintiff did not defend under a reservation of rights. We do note our agreement with defendant that plaintiff is not entitled to reimbursement of any of its defense costs incurred until the time of the termination of the *Fishel* action. *See Terra Nova Insurance Co. v. 900 Bar, Inc.*, 887 F.2d 1213 (3d Cir. 1989). We will therefor enter judgment in favor of defendant on Count III of the complaint.

4. SBC contributed to the waste from 1975 through 1983. Specifically, during that time period, Shealer hauled waste for the Pfaltzgraff Company, a subsidiary of SBC.

> reason of liability to which the insurance applies ... for bodily injury, property damage or personal injury caused by an occurrence ....

Plaintiff contends that response costs under CERCLA are equitable in nature. In contrast, it is well established that damages are a legal remedy. Accordingly, it argues that its promise to pay on behalf of SBC any "damages" for which the latter may be liable is inapplicable here. Federal relies mainly upon *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir. 1988) (en banc) (NEPACCO) and *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987). It has also referred us to *AIU Insurance Co. v. Superior Court (FMC Corp.)*, 213 Cal. App. 3d 1219, 262 Cal. Rptr. 182 (1989) *review granted*, (Cal. Nov. 30, 1989). *NEPACCO* held that under Missouri law an insurer's obligation to pay "damages" on behalf of its insured does not include CERCLA response costs. *Maryland Casualty* reached the same conclusion under Maryland law. SBC counters with cases in support of its position that response costs, or more generally costs necessary to repair property damage, are damages within the meaning of the policy language.[5] *See, e.g., Aerojet General Corp. v. San Mateo County Superior Court (Cheshire and Companies)*, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621 (1989); *New Castle County v. Hartford Accident and Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *Avondale Industries, Inc. v. Travelers Indemnity Co.*, 697 F. Supp. 1314 (S.D. N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989); *National Indemnity Co. v. United States Pollution Control, Inc.*, 717 F. Supp. 765 (W.D. Okla. 1989).

Each of these lines of cases has its own theme. Those holding that response costs, or costs of restoring property, are recoverable as damages refuse to assign a technical meaning to the word "damages," referring the lay person's point of view and emphasizing the reasonable expectations of the insured. Those holding that such costs are not recoverable start from the premise that damages has a technical, but nonetheless, accepted meaning which does not include the costs of complying with equitable actions. The latter

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5. We reject defendant's contention that the Westinghouse contribution claim transforms the claim for response costs into a purely legal one. *See Armco, supra*, 822 F.2d at 1352.

also note the potentially unlimited exposure which might result if an insurance company was required to pay for response costs.

Our own analysis of the issue is not very different from the en banc discussion in *NEPACCO* except for the result. We believe that under Pennsylvania law Federal can be required to pay for at least some of the response costs.

In interpreting insurance contracts, Pennsylvania, while construing words of common usage "in their nature plain, and ordinary sense" will construe technical words "in their technical sense unless a contrary intention clearly appears." *Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 385 Pa. 394, 397-98, 123 A.2d 413, 415 (1956) (construing in a technical sense the phrases "other insurance" and "concurrent or not"). *See also Easton v. Washington County Insurance Co.*, 391 Pa. 28, 137 A.2d 332 (1957) ("sheds" in a fire insurance policy is not a word of art but a simple word of common usage); *Mohan v. Union Fidelity life Insurance Co.*, 207 Pa. Super. 205, 216 A.2d 342, 348 n.11 (1966) (per curiam affirmance incorporating the opinion of the trial court) (paycheck is a word of common meaning); *Shelley v. Nationwide Mutual Insurance Co.*, 213 Pa. Super. 218, 245 A.2d 674 (1968).

This rule is in accord with Pennsylvania rules of contract construction in general. In interpreting a contract:

> It is fundamental that "Technical terms and words of art are [to be] given their technical meaning unless the context or a usage which is applicable indicates a different meaning". Restatement, Contracts, § 235(b). And this rule is especially applicable where the words of art used are legal terms. 17 C.J.S., Contracts, § 302, page 720. [remaining citation omitted].

Fischer & Porter Co. v. Porter, 364 Pa. 495, 500, 72 A.2d 98, 101 (1950) (brackets added in part). *See also generally Spatz v. Nascone*, 283 Pa. Super. 517, 424 A.2d 929 (1981); *Rothstein v. Aetna Insurance Co.*, 216 Pa. Super. 418, 268 A.2d 233 (1970). In accord with *Fischer*, the Third Circuit in *Miller v. Weller*, 288 F.2d 438 (3d Cir. 1961), concluded that damages was "a word of art with a rather definite meaning," id. at 439, and used the definition of

damages as given in the case law, id. at n.4, to interpret a contract.[6]

Based upon the foregoing we must interpret damages in the instant case in its technical sense as it is "generally recognized in the law," *Miller,* 288 F.2d at 440, and therefore permit indemnification only to the extent that the response costs are recoverable under Pennsylvania law as an item of damages.

In making this determination, it is not very helpful to note that damages are a legal remedy and the sums sought from SBC represent Westinghouse's expenses to comply with equitable orders of the EPA. To recognize that damages are not equitable relief does not answer the specific question whether the costs of restoring land to its original condition are, nevertheless, recoverable in damages. It is well established in Pennsylvania that such costs are recoverable. The Pennsylvania Superior Court recently stated the general rule as follows:

> The measure of damages for injury to property is the cost of repairs where that injury is reparable unless such cost is equal to or exceeds the value of the injured property. *Rabe v. Shoenberger,* 213 Pa. 252, 62 A. 854 (1906); *Wade v. S.J. Groves & Son Co.,* 283 Pa. Super. 464, 424 A.2d 902 (1981). Where the cost of repair does exceed the value of said property, the cost of damages becomes the value of the property. *Id.* Where, however, the injury is deemed to be permanent, the measure of damages becomes the decrease in the fair market value of the property. *Id.; Bumbarger v. Walker,* 193 Pa. Super. 301, 164 A.2d 144 (1960).

Kirkbride v. Lisbon Contractors, Inc., 385 Pa. Super. 292, _____, 560 A.3d 809, 812 (1989) (en banc).

In *Kirkbride,* the Superior Court affirmed a damage award in the form of restoration costs despite the defendant's contention that such costs were improper since they significantly exceeded the diminution in the value of the land. Because the injury was reparable, however, plaintiffs' "were entitled to receive the costs of

6. We recognize that the Third Circuit considered another important element of this case was the drafting of the agreement by two lawyers who should have recognized the significance of using the word damages but we believe the *Fischer* case was an equally valid consideration.

restoring their land back to its original condition." *Id.* at _____, 560 A.2d at 813.

Since, under Pennsylvania law "where an injury is reparable, the damage is the cost of repair or restoration," *Id.* at _____, 560 A.2d at 813, it appears that CERCLA response costs would include the cost of restoring the land and cleaning up the pollution. *See generally, Lutz v. Chromatex, Inc.*, 718 F. Supp. 413 (M.D. Pa. 1989). There is a limitation, however, upon the damages that may be recovered. They cannot exceed the value of the property.[7] *See also NEPACCO, supra*, 842 F.2d at 989 (Heaney, J., concurring and dissenting) (the record clearly showed that the cost of cleaning up was less than the value of the government's interest in the property and therefore was the proper measure of damages).[8]

Federal also contends that there is no coverage because of the pollution exclusion in certain of the policies. Defendant counters that plaintiff is ignoring the period of time when the policies did not contain a pollution exclusion and that, pursuant to *ACandS, Inc. v. Aetna Casualty And Surety Co.*, 764 F.2d 968 (3d Cir. 1985); *General Refractories Co. v. Travelers Insurance Co.*, 1988 WL 136317 (E.D. Pa.); *Reading Co. v. Travelers Indemnity Co.*, 1988 WL 13242 (E.D. Pa.) and *Centennial Insurance Co. v. Lumbermen's Mutual Casualty Co.*, 677 F. Supp. 342 (E.D. Pa. 1987), Pennsylvania would permit full recovery of defendant's CERCLA obligations under the earlier policies even if some of the disposal and discharges contributing to the need for response costs occurred when the pollution exclusion was applicable.[9] Specifically, SBC contends that the "exposure theory," as it has come to be known, of determining when "property damage" has occurred or of determining when an "occurrence" within the meaning of the

7. We think that we can conclude that the damage was reparable since remedial efforts have been undertaken. If the damage had been permanent, the damages that Federal would have been responsible for would have been the diminution in the value of the land.

8. Hence, the fears of some courts that deciding for coverage would impose unlimited liability upon insurance companies need not be addressed here. *Compare AIU, supra.*.

9. There is a dispute whether the pollution exclusion was first set forth in a policy on March 2, 1977, as SBC contends, or on March 2, 1976, as Federal contends. Our analysis of the pollution exclusion issue will not require us to resolve this dispute.

policies' definitions happened, dictates that coverage for the pollution in the underlying action can start from the time in 1975 that Shealer began disposing of wastes at the various dump sites for SBC.

In *ACandS*, the Third Circuit held that, along with the theories of "exposure-in-residence" and "manifestation," an insurance policy providing coverage for bodily injury would be applicable to claims for bodily injuries arising from exposure to asbestos under the exposure theory; that is, a policy in effect at the time the injured party was exposed to asbestos would provide coverage for an illness manifesting itself after the expiration of the policy period. *Accord Centennial, supra* (coverage for environmental discharge triggered at times wastes were dumped onto the land). We agree with defendant. Therefore, coverage under the earlier policies not containing a pollution exclusion was triggered in this case.

ACandS is also significant here because of a potential proration issue. In *ACandS*, the defendant insurers argued that any particular policy could only be responsible for a pro rata share of an injury, measured, in part, by its effective period. Rejecting this contention, the Third Circuit stated:

> The policies require the insurers to pay all sums which ACandS becomes "legally obligated to pay" because of bodily injury during the policy period. It is uncontested that under principles of tort law ACandS may be held fully liable for a personal injury plaintiff's damages caused in part by ACandS' asbestos during a particular period, even though plaintiff's damages may also have been caused, in part, at other times. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). It follows that if a plaintiff's damages are caused in part during an insured period, it is irrelevant to ACandS' legal obligations and, therefore, to the insurer's liability that they were also caused, in part, during another period. *See Keene*, 667 F.2d at 1047-49. We think the Supreme Court of Pennsylvania would agree.

764 F.2d at 974.

The policies at issue in the instant case contain similar language. And generators of environmental waste can be held jointly liable for all response costs even though others may have contributed to the pollution. *See United States v. Marisol. Inc.*, _____ F. Supp. _____ 1989 WL 138175 (M.D. Pa.) (Nealon, J.). On the current record, we conclude then that the earlier policies would provide coverage for all of SBC's response costs liabilities regardless of the presence of the pollution exclusion in later policies.

Nevertheless, because it might advance the ultimate resolution of this action, we present our observations on the effect of the pollution exclusion clause. A representative exclusion provided that the policy would not apply to:

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

This language provides that there is no coverage for damages resulting from pollution unless the pollution was sudden and accidental. The pollution here occurred gradually over a period of years.[10] Hence, Federal argues there is no coverage. Plaintiff cites *Lower Paxon Township v. United States Fidelity And Guaranty Co.*, 383 Pa. Super. 558, 557 A.2d 393 (1989) and *Techalloy Company, Inc. v. Reliance Insurance Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984). In both of these cases the Pennsylvania Superior Court held that coverage for pollution could only be odbtained "if the discharge itself is both sudden, meaning abrupt and lasting only a short time, and accidental, meaning unexpected." *Lower Paxon*, 383 Pa. Super. at 571, 557 A.2d at 399. SBC contends that these cases were wrongly decided and that the better rule is set forth in cases like *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) and *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del.

10. We reject defendant's contention that plaintiff has not proven that the pollution was gradual. That was established in the underlying action.

1987). Those cases hold that "sudden and accidental" is ambiguous, must be construed in the insured's favor, and requires only an accidental discharge for coverage to take effect. SBC points out that we are not controlled by intermediate state court appellate decisions, see *Wisnieski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985), and must rule as we think the state's highest court would. *Id.* We have carefully considered cases on both sides of this issue and agree with the reasoning and holding of the courts in *Lower Paxon* and *Techalloy.*

SBC further argues that *Lower Paxon* and *Techalloy* do not control here because the insured was the active polluter in those cases. In the instant case, SBC had hired Shealer to dispose of environmental waste and the discharges occurred at locations chosen and controlled by Shealer. SBC argues the pollution exclusion is ambiguous concerning its application to pollution by third parties and accordingly should be construed to provide coverage for SBC's liability arising from Shealer's disposal of defendant's waste. Defendant relies principally upon *United States Fidelity And Guaranty Co. v. Specialty Coatings Co.*, 180 Ill. App.3d 378, 535 N.E.2d 1071 (1989). Faced there with a similar argument from the insured, the court stated as follows:

> It is not clear from the circumstances of this case, and from the underwriting history of the exclusionary clause to which we will later refer, that the parties intended the exclusionary clause to apply whether the insured was an active polluter or not. Certainly, those engaged in manufacturing processes would be expected to have sought other or additional insurance had they known that the mere act of engaging an independent agency such as a waste disposal in the ordinary course of having industrial wastes removed from their property would result in the denial of insurance coverage. There is nothing in the record to show whether such additional insurance was even available when defendants purchased their USF & G policy. This ambiguity must be resolved against USF & G in consonance with the authorities previously cited.

Id. at _____ 535 N.Ed.2d at 1076.

Whatever validity this approach to insurance policy interpretation has in Illinois, it cannot be used under Pennsylvania law. In Pennsylvania, the intent of the parties is ascertained first from the language of the policy if possible. *See Standard Venetian Blind Co. v. American Empire Insurance Co.*, 503 Pa. 300, 469 A.2d 563 (1983). The pollution exclusion makes no reference at all to active polluters or passive polluters. These terms are foreign to the policies in question. As such, we agree with the court in *Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1325 (E.D. Mich. 1988), when faced with the same argument by the insureds there:

> Insofar as the term "active polluter" is a rubric for analyzing whether coverage exists under the terms of the policy, it is at best unnecessary. If, however, the term imports some additional criteria not found in the policy, it is not part of the parties' contract. Policyholders' argument is not persuasive.

In our view, the pollution exclusion broadly, but nevertheless plainly, excludes coverage for gradual pollution. Thus, under Pennsylvania law, there is no occasion or opportunity to indulge in a loose examination of the "circumstances" of the case or "the underwriting history of the exclusionary clause." Nor should we examine what would have been expected of SBC in obtaining other insurance which would have covered the risk. Federal's only obligation is to fulfill its obligations for the risks it contractually obligated itself.

Along with *Specialty Coatings*, SBC also, in part, relies upon *Niagara County v. Utica Mutual Insurance Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981); *Covington Township v. Pacific Employers Insurance Co.*, 639 F.Supp. 793 (M.D. Pa. 1986); *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*, 186 N.J. Super 156, 451 A.2d 990 (Law Div. 1982) and *United Pacific Insurance Co. v. Van's Westlake Union. Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983). Most of these cases were correctly critiqued by the court in *Ex-Cell-O, supra*, as follows:

> The distinction between "active" and "passive" polluters originates from *Niagara County*, in which the court held that

> the pollution exclusion in the county's policy did not preclude the insurer's duty to defend the county against an action regarding hazardous waste disposal at Love Canal, where the county merely owned the land. Interpreting the legislative history behind the statutorily mandated pollution exclusion, the court suggested that it was meant to apply to "industry-related activities." 427 N.Y.S.2d at 174. Subsequent cases have ignored the statutory basis of *Niagara County's* holding, and extended the concept beyond its more limited holding. *See, Jackson Township,* 451 A.2d at 991-92, and *Van's Westlake Union,* 664 P.2d at 1264-66. *See* Note, *The Pollution Exclusion Clause Through the Looking Glass,* 74 Ceo. L.J. 1237, 1271-73 (1986) ("Whatever little analytical value the labels might have had in the *Niagara County* context, they have no value once the facts change.").

702 F. Supp. at 1325 n.12.

Moreover, *Niagara County* has not received unanimous acceptance within its own state. In *Powers Chemco. Inc. v. Federal Insurance Co.,* 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988), the Appellate Division, Second Department, refused to follow it. In *Powers Chemco,* the plaintiff bought land which had been used by the seller to dispose of hazardous material over a number of years. Powers Chemco entered into a consent decree with New York State to clean up the site and sought indemnification from its defendant insurer. Federal relied upon the same pollution exclusion at issue in the instant case to avoid coverage. Plaintiff asserted, as SBC does here, that the exclusion applies only to active polluters. Rejecting this argument, the appellate court stated:

> The plaintiff emphasizes the fact that the discharge of hazardous materials was performed by the former owner of the property without its knowledge or consent. Thus, it concludes that the rationale for the inclusion of a pollution exclusion clause in general liability policies, which is, in part "to deter deliberate pollution by withholding the shelter of liability insurance for injuries resulting from such conduct." (Technicon Electronics Corp. v. American Home Assur. Co.,

> supra at 103), would not be served by applying the exclusion to preclude coverage here. In support of this proposition, the plaintiff relies upon Niagara County v. Utica Mut. Ins. Co., 80 A.D.2d 415, 439 N.Y.S.2d 538, lv. dismissed, 54 N.Y.2d 608, 443 N.Y.S.2d 1030, 427 N.E.2d 1191, and Autotronic Systems v. Aetna Life & Cas. Co., 89 A.D.2d 401, 456 N.Y.S.2d 504, decided by the Appellate Division, Fourth Department and Third Department, respectively We decline to follow the holding in Autotronic and the dicta in Niagara County. The clear and unambiguous language of the pollution exclusion makes no exception for pollution caused by someone other than the insured where that pollution is not "sudden and accidental". To impose such an exception under the instant circumstances would be to "vary the contract of insurance to accomplish (this court's) notions of abstract justice or moral obligation" (Breed v. Insurance Co. of North Amer., 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282), something which we may not do.

144 A.D.2d at _____ 533 N.Y.S.2d at 1011-12.[11]

Most significantly, the New York Court of Appeals recently affirmed the decision of the Second Department in language including that of the lower court:

> We also reject plaintiff's contention that since it was not the actual polluter, but merely inherited the problem from the prior landowner, the pollution exclusion clause cannot bar its present insurance claim. Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured.

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11. We would also note that *Covington Township, supra,* a decision of this court, per Judge Nealon, is distinguishable because the Township, while charged with permitting discharges of pollution, also was alleged to have been negligent in monitoring waste disposal sites and issuing permits.

_____ N.Y.2d _____, _____, _____ N.E.2d _____, _____ 1989 WL 139608 (1989). The court concluded that "the exclusion clause [was] 'unambiguously plain and operative' ...." *Id.* at _____, _____ N.E.2d at _____ (brackets added) (quoted case omitted).

We would therefore not accept defendant's argument as it relates to the policies containing the exclusion.

Plaintiff has also argued that the releases executed by the *Fishel* plaintiffs in the separate settlements consummated with Westinghouse and SBC have extinguished Westinghouse's claim for contribution against SBC. But, as pointed out by defendant, Federal would still have had a duty to defend the contribution claims and the direct claims by the *Fishel* plaintiffs which were still pending at the time SBC requested a defense. *See Beckwith, supra.* The settlements might have been a defense to the claims in the underlying action but could not excuse SBC's insurer from defending the claim in the first instance.

We will issue an appropriate order.

/s/

William W. Caldwell
United States District Judge

Date: December 21, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL
INSURANCE COMPANY, :
Plaintiff
:
v. CIVIL ACTION NO: 88-0469
:
SUSQUEHANNA
BROADCASTING COMPANY,
Defendant :

ORDER AND JUDGMENT

AND NOW, this 21st day of December, 1989, upon consideration of the cross-motions for summary judgment, it is ordered and declared that:

1. Plaintiff, Federal Insurance Company, had a duty to indemnify and defend defendant, Susquehanna Broadcasting Company, on the third party claim of Westinghouse Electric Corporation, for response costs arising from *Fishel v. Westinghouse*, Civil Action No. 85-0216.

2. Judgment is hereby entered in favor of defendant, Susquehanna Broadcasting Company, and against plaintiff, Federal Insurance Company, on the Third Count of plaintiff's complaint.

3. The Clerk of Court is directed to close this file.

/s/
William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL
INSURANCE COMPANY, :
Plaintiff
:
v. CIVIL ACTION NO: 88-0469
:
SUSQUEHANNA
BROADCASTING COMPANY,
Defendant :

MEMORANDUM

On December 21, 1989, we entered summary judgment in favor of defendant, Susquehanna Broadcasting Co. (SBC), concluding that plaintiff, Federal Insurance Co. (Federal), was liable under its comprehensive general liability insurance for response costs incurred by SBC in cleaning up environmental pollution at certain sites in the Gettysburg, Pennsylvania area. *See* 727 F. Supp. 169 (M.D. Pa. 1989). SBC has filed a timely motion to reconsider and amend the judgment under Fed. R. Civ. P. 59(e). SBC contends that we erred in concluding that its recovery under the policy would be limited to the value of the polluted property. In its brief in support of the motion, defendant also takes issue with our analysis that under Pennsylvania law, the word "damages" in the Federal policy had to be construed in a technical sense as it appears in the case law rather than from a lay person's point of view. The brief also requests that we delete our discussion of the pollution exclusion as necessary dictum. In opposing defendant's motion, Federal does not contest defendant's argument that we erroneously imposed a " 'property value' limitation," as SBC characterizes it. Instead, plaintiff has attempted to convince us that our threshold

conclusion was wrong and that the responses costs are not recoverable as damages under Pennsylvania law.[1]

In concluding that any recovery for response costs would be limited to the value of the affected property we relied upon *Kirkbride v. Lisbon Contractors, Inc.*, 385 Pa. Super. 292, 560 A.2d 809 (1989)(en banc), in which the Pennsylvania Superior Court summarized the holdings of various Pennsylvania cases permitting recovery as damages the cost of repairing or restoring real property but which limited recovery to the value of the property. Defendant stresses that this was an issue not argued or briefed by the parties and that *Kirkbride*, a trespass action under the common law, does not support the conclusion that recovery of CERCLA[2] response costs are similarly limited. SBC points out that Federal agreed to pay "all sums" which SBC became "obligated to pay as damages." 727 F. Supp. at 173. The obligation to pay response costs arises under CERCLA which is not limited by reference to a common law measure or limitation upon the damages recoverable. SBC cites, among other cases, *CPS Chemical Co., Inc. v. Continental Insurance Co.*, 222 N.J. Super. 175, 536 A.2d 311 (1988) and *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (1975) in its support. In the above-cited cases the courts looked to the environmental law under which the legal obligation was imposed to determine the measure of damages rather than the common law. We agree with defendant's position and wil grant the motion insofar as it attacks our previous conclusion that damages are limited by the value of the property.

Defendant has also contested our decision to view the word "damages" in the policy in a technical sense. SBC argues that on

1. SBC contends that Federal is foreclosed from making this argument since plaintiff did not file its own motion to alter or amend. Accordingly, Federal should be limited to rebutting SBC's arguments. We believe, however, that SBC's motion confers upon us the discretion to consider Federal's position even though Federal could not have independently at this time sought reconsideration. *See Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Continental Casualty Co. v. American Fidelity And Casualty Co.*, 186 F. Supp. 173 (S.D. Ill. 1959). The same conclusion applies to the grounds set forth in defendant's brief which were not set forth in the motion.

2. The Comprehensive, Environmental Response, Compensation and Liability Act. 42 U.S.C. § 6901 *et seq.*

this issue we incorrectly relied upon *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir. 1988) (en banc) (*NEPACCO*) and that we misinterpreted *Miller v. Weller*, 288 F.2d 438 (3d Cir. 1961) and *Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 385 Pa. 394, 123 A.2d 413 (1956). Contrary to defendant's contention, we did not rely upon *NEPACCO*. We did note that our analysis would be similar to that of the court in *NEPACCO* but it did not flow from that case. Rather, it was based upon an independent analysis of cases like *Miller* and *Blue Anchor* which construed Pennsylvania law. As for defendant's argument concerning the latter cases, our interpretation is set forth in our original memorandum and we believe it is correct.[3]

SBC has also requested that we delete our discussion of the pollution exclusion clause as unnecessary dictum. We decline to do so. Our analysis was offered in an attempt to narrow the issues and expedite resolution of the case. That our effort was fruitless does not mean that we should now disavow it. The relief defendant seeks is unnecessary and we reject it.

In connection with plaintiff's argument that we erred in concluding that response costs are recoverable as damages, we think it is Federal that is elevating form over substance by its focus upon CERCLA response costs as equitable and restorative in nature rather than legal and compensatory. As the parties and the court apparently agree, significance cannot be attached solely to labels on the causes of action. If, in fact, response costs, the costs of restoring land to its original condition, are recoverable as damages under Pennsylvania law, it does not matter what the nature of the CERCLA action is. This is where *Kirkbride* can be relied upon. It upheld an award of damages measured by the cost of restoring the property to its original condition. The damages were referred to as compensatory but it is clear that substantively their purpose was to

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3. Defendant has also referred us to *Aronson Associates, Inc. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 14 Pa. D. & C. Rep. 3d 1, 8 (Dauphin Co. 1977) (Caldwell, J.). But in that case we had to construe the words "sudden" and "accidental," words of common meaning.

restore the original condition of the land, not compensation for damage inflicted.

We will issue an appropriate order.

/s/

William W. Caldwell
United States District Judge

Date: May 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL
INSURANCE COMPANY, :
Plaintiff
:
v. CIVIL ACTION NO: 88-0469
:
SUSQUEHANNA
BROADCASTING COMPANY,
Defendant :

ORDER

AND NOW, this 18th day of May, 1990, upon consideration of Defendant's motion to reconsider and amend the judgment, it is ordered that:

1. The motion is granted in part.
2. Defendant's recovery under thepolicy shall not be limited by the value of the polluted properties.
3. In all other respects, the motion is denied.

/s/
William W. Caldwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5523 and 90-5524

FEDERAL INSURANCE CO.
V.

SUSQUEHANNA BROADCASTING CO.

Federal Insurance Company,
Appellant in 90-5523

Susquehanna Broadcasting Co. ("SBC"),
Appellant in 90-5524

(D.C. Civ. No. 88-00469)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, MANSMANN, SCIRICA, NYGAARD, ALITO and HIGGINBOTHAM*, *Circuit Judges*

The petition for rehearing filed by appellant/cross-appellee Federal Insurance Company in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

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* As to panel rehearing only.

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/

Circuit Judge

Dated: March 28, 1991

§9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency play;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be at the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "compara-

ble maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) **Defenses.** There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) **Determination of amounts.**

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed -

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 USCS §§ 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in

section 101(14)(A) of this title [42 USCS § 9601 (14)(A)] into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this title [42 USCS §§ 9601 et seq.].

(2) Not withstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A) (i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject tot the provisions of title 49 of the United States Code or vessels subject to the provisions of title 33 or 46 of the United States Code, subparagraph (A) (ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act [42 USCS § 9604 or 9606], such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112(c) of this Act [42 USCS §§ 9612(c)]. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) **Rendering care of advice.**

(1) In general. Except as provided in paragraph (2), no person shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments. No State or local government shall be liable under this title [42 USCS §§ 9601 et seq.] for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision. This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) **Indemnification, hold harmless, etc. agreements or conveyances; subrogation rights.**

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this title [42 USCS §§ 9601 et seq.], including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to

liabiiity under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) **Natural resources liability; designation of public trustees of natural resources.**

(1) Natural resources liability. In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: Provided, however, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural resource damages, including the costs of damage assess-

ment or restoration, rehabilitation, or acquisition for the same release and natural resource[.] There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act [enacted Dec. 11, 1980].

(2) Designation of federal and state officials.

(A) Federal. The President shall designate in the National Contingency Plan published under section 105 of this Act [42 USCS § 9605] the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act [33 USCS §1321]. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act and such section 311 [33 USCS §13210 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State. The Governor or each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this Act and section 311 of the Federal Water Pollution Control Act [33 USCS §1321] and shall notify the President of such designations. Such Sate officials shall assess damages to natural resources for the purposes of this Act and such section 311 [33 USCS §1321] for those natural resources under their trusteeship.

(C) Rebuttable presumption. Any determination or assessment of damages to natural resources for the purposes of this Act and section 311 of the Federal Water Pollution Control Act [33 USCS §1321] made by a Federal or State trustee in accordance with the regulations promulgated under section 301(c) of this Act [42 USCS §9651(c)] shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act or section 311 of the Federal Water Pollution Control Act [33 USCS §1321].

(g) **Federal agencies.** For provisions relating to Federal agencies, see Section 120 of this Act [42 USCS §9620].

(h) **Owner or operator of vessel.** The owner or operator of a vessel shall be liable in accordance with this section, under mari-

time tort law, and as provided under section 114 of this Act [42 USCS § 9614] notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) **Application of registered pesticide product.** No person (including the United States or any State or Indian Tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 USCS §§ 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) **Obligations or liability pursuant to federally permitted release.** Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 101(10)(B) or (C) [42 USCS § 9601(10)(B) or (C)] shall be recoverable in an action brought under section 309(b) of the Clean Water Act [33 USCS § 1319(b)].

(k) **Transfer to, and assumption by, Post-closure Liability Fund of liability of owner or operator of solid waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc., monitoring costs; reports.**

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste

Disposal Act [42 USCS § 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 232 of this Act [42 USCS § 9641] when -

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 USCS § 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act) [42 USCS § 6926(b)] that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 232 of this Act [42 USCS § 9641], and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 232 of this Act [42 USCS § 9641] may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 USCS § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after the date of enactment of this Act [enacted Dec. 11, 1980], the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in title II of this Act.

(B) Not later than eighteen months after the date of enactment of this Act [enacted Dec. 11, 1980] and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this Act and this subsection.

Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under title II of this Act.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer. Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 111 of this Act [42 USCS § 9611(j)], no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 232 of this Act prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program.

(A) Study. The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) Program elements. The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments. The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 USCS § 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to -

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures. In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options. In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (13) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to -

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid

Waste Disposal Act [42 USCS §§ 6921 et seq. and 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 232 of this Act, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled- risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) Recommendations. The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(l) **Federal Lien.**

(1) In general All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which -

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration. The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this Act.

(B) The time that the person referred to in paragraph

(1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [42 USCS § 9613].

(3) Notice and validity. The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of the Internal Revenue Code of 1954 [26 USCS § 6323(h)].

(4) Action in rem. The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) **Maritime lien.** All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel

may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs. (Dec. 11, 1980, P. L. 96-510, Title I, § 107, 94 Stat. 2781; Oct. 17, 1986, P.L. 99-499, Title I, 107(a)-(d)(2), (e), (f), 127(b), (e), Title II, §§ 201, 207(c), 100 Stat. 1628, 1692, 1693, 1705.)

(2)

No. 90-1971

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL INSURANCE CO.,
Petitioner,

v.

SUSQUEHANNA BROADCASTING CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the judgment of the courts below, based on Pennsylvania law, that petitioner has a duty to defend and indemnify respondent under liability insurance policies with respect to proceedings to investigate and remedy pollution pursuant to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, conflicts with and is preempted by that Act.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Susquehanna Broadcasting Co. ("SBC")[1] files this Brief in Opposition to the Petition for a Writ of Certiorari by Petitioner Federal Insurance Company ("Federal").[2]

COUNTERSTATEMENT OF STATUTES AND REGULATIONS INVOLVED

Contrary to Federal's statement of the statutes and regulations involved, the questions presented in this case

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[1] Pursuant to Rule 29.1 of this Court, SBC states that it is a closely held corporation with no subsidiaries or affiliates that have publicly traded shares outstanding.

[2] As used herein, "PA" refers to the Appendix to the petition ("Pet.") and "JA" refers to the Joint Appendix filed in the Court of Appeals. For the convenience of the Court, a copy of the Joint Appendix and Federal's Reply Brief in the Court of Appeals have been lodged with the Clerk.

involve the interpretation of insurance agreements under Pennsylvania common law. They are not governed by the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, nor any other federal or state statute or regulation.

COUNTERSTATEMENT OF THE CASE

This case arises out of actions by private plaintiffs and by the U.S. Environmental Protection Agency ("EPA") under CERCLA against Westinghouse Electric Corp. ("Westinghouse") to impose liability for investigating, cleaning up, and otherwise responding to alleged pollution.[3] After Westinghouse sued SBC for contribution and indemnity as to the claims against it, Federal initially agreed to defend SBC under several comprehensive general liability ("CGL") and excess/umbrella liability policies Federal had issued to SBC since 1964. Federal also paid SBC's liability (under a settlement) to the private plaintiffs.

In March 1988, Federal terminated its defense of SBC against Westinghouse and brought a declaratory judg-

[3] The underlying CERCLA actions arise from the discovery in the early 1980's of contamination at several sites in the Gettysburg area, including a Westinghouse plant and two rural sites at which an independent contractor, Frederick Shealer, disposed of waste for a period of years for Westinghouse as well as SBC (starting in 1975) and other private parties. Because of that discovery, EPA, under CERCLA, required Westinghouse to investigate the contamination. In addition, residents and property owners in the vicinity of the sites sued Westinghouse and Shealer under CERCLA and Pennsylvania statutes and common law, seeking to recover for alleged bodily injuries and property damage caused by the contamination. Westinghouse thereafter impleaded SBC and others who used Shealer and sought a money judgment against them for contribution and for indemnity as to all or a portion of its financial liabilities to EPA and the resident plaintiffs. The resident plaintiffs then cross-claimed against SBC and the other third-party defendants, who also counterclaimed against Westinghouse. All of the underlying claims concerning SBC have been settled.

ment action in the Middle District of Pennsylvania under the district court's diversity jurisdiction. Raising no federal question, Federal sought a ruling that under the terms of its liability policies Federal was not obligated to defend or indemnify SBC with respect to Westinghouse's claims.[4]

The specific issues raised by Federal's claims in this case were delineated in a stipulated order (JA at A51, A54): (1) whether costs incurred in proceedings to investigate and remediate pollution under CERCLA were "damages" under the CGL and excess policies Federal issued to SBC;[5] and (2) whether coverage was precluded by the so-called "pollution exclusion" contained in some of those policies.[6] In support of its motion for summary judgment, Federal contended that the court's interpretation of the policy language on the "damages" issue should take account of the asserted CERCLA policy of "internalizing" environmental costs (Fed. Mem. in Support of Motion for Summary Judgment at 13). Federal did not contend that there was a conflict between the allowance of coverage and the provisions of CERCLA so that CERCLA precluded an application of state law under which CERCLA response costs were covered "damages."

Based on its interpretation of Pennsylvania law, the district court granted summary judgment for SBC and

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[4] Federal also sought restitution from SBC of those defense costs it had incurred prior to terminating its defense of SBC with respect to Westinghouse's third-party claims.

[5] Under these policies Federal is obliged to indemnify SBC for "all sums which the insured [SBC] shall become legally obligated to pay as damages because of bodily injury or property damage" (JA A235). Federal is also required "to defend any suit . . . seeking damages on account of such bodily injury or property damage" (*id.*).

[6] Those policies excluded coverage for intentional pollution but covered contamination which was "sudden and accidental" (JA at A254).

held that Federal had a duty to defend and indemnify SBC under the policies in force in 1975, when SBC's disposal began (PA at A19).[7] The district court's opinion did not discuss Federal's reference to CERCLA policy. Federal filed no post-judgment motion. Moreover, in responding to a post-trial motion by SBC,[8] Federal sought reconsideration of the court's interpretation of Pennsylvania law, but did not argue that the court's ruling conflicted with or was preempted by CERCLA.

Both parties appealed to the Court of Appeals for the Third Circuit.[9] Federal did not raise as an issue on appeal any contention that a construction of the policies in favor of coverage as a matter of state law would conflict with or be preempted by CERCLA.[10] While Federal

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[7] The district court found it unnecessary to decide the questions raised as to the applicability of the pollution exclusion, and whether it first appeared in 1976 or 1977, but went on to make "observations" on the pollution exclusion suggesting that it did not apply to "gradual" pollution (PA A13-A18).

[8] The district court had initially limited the "damages" SBC could recover to "the value of the property" (PA at A11). SBC filed a motion pursuant to Rule 59, Fed. R. Civ. P., requesting that the district court reconsider and amend its judgment insofar as it imposed limitations on Federal's duty to indemnify SBC. The district court granted SBC's motion by removing the "property value" limitation, which Federal had agreed was erroneous (PA at A20).

[9] SBC appealed from the district court's failure to decide that the pollution exclusion first appeared in 1977, from its observations concerning that exclusion, and from its denial of SBC's request for attorney fees.

[10] In both its civil appeal information statement and the statement of issues in its opening brief, required by Fed. R. App. P. 28(a)(2) and Third Cir. R. 21(1)(A)(d), Federal limited its issues on appeal to whether, under Pennsylvania law: the terms of the policies can be interpreted to provide coverage; if so, when that coverage was triggered (a question Federal had not raised in the district court); whether coverage for "response costs" is limited to the value of the property (although Federal had agreed that such a limitation was erroneous); and whether a settlement agreement between the resi-

did again allude to the alleged "internalization" of costs goal of CERCLA (Fed. Appeal Br. at 18), Federal also did not argue in any of its appellate briefs that the district court's decision in favor of coverage under state law conflicted with or was preempted by CERCLA. To the contrary, Federal argued that "[t]his case is about contract language" (Fed. Reply Br. at 5).

Further, in responding to a claim that public policy favored coverage, as evidenced by the widespread support for policyholders in similar cases through amicus briefs by states and the Department of Justice, Federal submitted and relied on the recent congressional testimony of the Assistant Administrator for Enforcement at EPA, primarily responsible for enforcing CERCLA. His testimony presented the federal government's view that these insurance coverage questions concerning CERCLA liability are governed entirely by state law:

> [t]he question whether an insurer is required to indemnify its insured against Superfund liability turns on the interpretation of the private insurance contract entered into by those parties; typically, the Comprehensive General Liability ("CGL") insurance policy is the instrument used to protect commercial entities against various types of liability. *Although CERCLA provides that certain categories of parties are to be held liable for hazardous substance contamination, the statute leaves the interpretation of insurance policies to state law. No special rules apply when construing insurance policies merely because the underlying liability arises as a result of CERCLA.* [Fed. Reply Br. at 20 and Exh. E at 7; emphasis added].

Federal also relied upon a letter from the Assistant Attorney General of the United States to a House Com-

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dent plaintiffs and SBC and the other third party defendants had extinguished Westinghouse's claims against SBC (a claim the district court had rejected (PA at A18)).

mittee endorsing the EPA testimony and explaining that the United States had filed an amicus brief in one case because it believed that the Eighth Circuit had "incorrectly interpreted Missouri law" in holding that "damages" should not be construed to include CERCLA response costs (*id.* at Exh. D at 2). The letter, which referred to the appeal in this case, in no way suggested that a correct interpretation of state law as providing such coverage would conflict with or be preempted by CERCLA.

By judgment order dated February 22, 1991, the Third Circuit affirmed without opinion the district court's judgment. Federal filed a petition for rehearing and suggestion of rehearing en banc, in which it raised no issue concerning any conflict between the judgment in this case and CERCLA. Rather, the only questions identified by Federal as important or otherwise warranting rehearing were questions of state law. On March 28, 1991, the Court of Appeals denied Federal's petition.

REASONS FOR DENYING THE PETITION

The petition should be denied because (1) the question presented by Federal was not raised in or addressed by the court below; (2) the question presented has not given rise to a conflict with any decision of this Court or any other appellate court, and (3) Federal erroneously contends that an interpretation of state law permitting insurance coverage for environmental contamination allegedly caused by an insured conflicts with or is preempted by CERCLA.

I. THE QUESTION PRESENTED TO THIS COURT BY FEDERAL WAS NOT RAISED IN THE COURT BELOW

In the court of appeals, Federal chose to litigate solely with respect to questions of state insurance contract law. Having lost twice on those questions, Federal now seeks to present a federal question—that the judgment finding

coverage conflicts with and is presumably preempted by CERCLA—as a vehicle for review by this Court. However, absent extraordinary circumstances not present here, this Court will not grant certiorari to review a question that was not squarely presented to the court of appeals and necessarily decided by that court's judgment. *Cf., e.g., EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (where petition presents question that "was not raised in the Court of Appeals," that question "is not properly before us").

As set forth in the counterstatement of the case, at no point did Federal contend in the court of appeals that the district court's judgment in SBC's favor conflicted with or was overridden by CERCLA—the sole issue Federal seeks to raise before this Court. To the contrary, Federal expressly stated that the case was only about the meaning of contract language. Further, it relied upon statements by EPA and the Justice Department that the question before the courts in this and like cases was governed solely by state contract law.

Moreover, as the court of appeals merely entered a judgment order affirming the district court's judgment, without any opinion, there is no basis for contending that the court of appeals ruled against a claim that Federal did not purport to make.[11] In any event, given the absence of an opinion of either court below addressing the question Federal now presents, this case would not be a

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[11] The court of appeals' affirmance is not necessarily an implicit rejection of Federal's claim of conflict with CERCLA, for the affirmance could have been based on the familiar rule that an appellate court need not address issues not squarely and timely raised by a party. *E.g., Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 237 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Battle v. Pennsylvania*, 629 F.2d 269, 271 n.1 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

suitable vehicle for the Court to consider that question even if it had been properly raised below.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER APPELLATE COURT

Even if the question addressed in the petition were properly presented in this case, Federal does not make any claim that the judgment below conflicts with any decision of this Court or any other court. Indeed, the very few appellate courts that have considered a similar claim of conflict with CERCLA have rejected it. *See, e.g., Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507, 510 n.1 (1990); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 799 P.2d 1253, 1262, 274 Cal. Rptr. 820 (1990).

III. FEDERAL'S CLAIM THAT THE JUDGMENT BELOW CONFLICTS WITH CERCLA IS WRONG

Federal's contention that the judgment requiring Federal to cover SBC's liability for CERCLA costs conflicts with the "polluter pays" principle of CERCLA is based not on any language of CERCLA, but entirely upon CERCLA's legislative history. Such an argument must fail. *E.g., United States v. Ron Pair Enterps., Inc.*, 489 U.S. 235, 241-42 (1989).

The text of CERCLA itself expressly permits responsible parties to obtain insurance to cover the costs to clean up environmental contamination. Thus, Section 107(e)(1) provides, in pertinent part, that "[n]othing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e)(1) (1990).[12] Indeed, Federal acknowledges that CERCLA

[12] Courts also have interpreted § 107(e)(1) to allow the kind of insurance at issue here. *See, e.g., AM Int'l, Inc. v. International Forging Equip.*, 743 F. Supp. 525, 529 (N.D. Ohio 1990) ("by the

"does not in and of itself preclude insurance coverage . . ." (Pet. 10). *Compare* 42 U.S.C. §§ 9672(a), 9673(a).

Moreover, nothing in the legislative history cited by Federal contradicts the statute's express allowance of insurance coverage. *See* S. Rep. No. 848, 96th Cong., 2d Sess. (1980). Federal argues that the policy of CERCLA requires that the polluter pay for its actions through the payment of insurance premiums, and that the insurance policies which the courts below held covered SBC do not reflect the risks under CERCLA through the premiums charged, since those policies were issued prior to the enactment of CERCLA. But Federal misstates the policy of internalization of costs alluded to in the Senate report on CERCLA (but not mentioned in the statute). That policy was to preclude generators or others in the chain of waste production and disposal from shifting the risk of loss to each other or to the victims injured by the hazardous material. S. Rep. No. 848, 96th Cong., 2d Sess. 13, 15, 33 (1980). The report said nothing about shifting of the risk of loss to insurers, let alone whether the extent of the risk was reflected in the premiums charged.

In view of the language and history of CERCLA, it is quite understandable why EPA and the Justice Department have concluded that CERCLA "leaves the interpretation of insurance policies to state law," and that "[n]o special rules apply when construing insurance policies merely because the underlying liability arises as a result of CERCLA" (Fed. Reply Br. Exh. E. at 7).

In essence, Federal's argument boils down to the premise that it failed to anticipate the risks involved in covering pollution liability when underwriting pre-CERCLA

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second sentence [of 107(e)(1)], Congress intended to permit any person to contract with others not already liable under the act to provide additional liability by way of insurance or indemnity"), *appeal pending*, No. 90-3958 (6th Cir.).

policies, which risks it desires to shift back to SBC. Courts have rejected such shifting of the risk of loss from the insurer to the insured, on the basis that the insurers' failure to draft their policies to exclude such potential liability cannot be invoked "to the detriment of the insured who purchased a 'comprehensive general liability' policy." *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989). In any event, there is no evidence in the record on historical estimates of anticipated costs or any other information tending to show that Federal priced its policies in specific reliance upon its present interpretation of the narrow scope of coverage under its policies.

Federal's position amounts to a claim that, as a matter of public policy, CGL policies should not be allowed to cover past (or future) CERCLA costs. Responding to the same claim, the Supreme Court of California opined in *AIU*:

> [b]ecause Congress and the [state] Legislature already have made the relevant public policy determinations, the issue before this Court is not whether CGL policies *may* provide the coverage sought, but whether they do provide it according to their terms. [*AIU*, *supra*, 799 P.2d at 1262 (emphasis in original).]

The question whether Federal's policies "do provide [coverage of SBC] according to their terms" is governed by state law, is not presented by Federal's petition, and is not an issue for review by this Court. *E.g.*, *Bishop v. Wood*, 426 U.S. 341, 346-47 n.10 (1976); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967), *overruled on other grounds in Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

For all of the foregoing reasons, Federal's petition should be denied.

Respectfully submitted,

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